U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSHUA A. HOLMES and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA

Docket No. 01-1093; Submitted on the Record;
Issued February 1, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant sustained a pulmonary condition causally related to his accepted exposure to asbestos.

On June 6, 1997 appellant, then a 55-year-old pipefitter, filed an occupational disease claim asserting that his pulmonary condition was a result of his federal employment. The employing establishment confirmed appellant's occupational exposure to asbestos.

On April 1, 1997 Dr. James V. Scutero, a Board-certified specialist in pulmonary disease, related appellant's history of exposure to asbestos both in federal employment and in the private sector. He related appellant's history of exposure to sand and dust at a private foundry, his history of smoking and his past medical history. After describing his findings on physical examination, Dr. Scutero noted that a chest x-ray showed increased markings at the bases consistent with pulmonary fibrosis. He reported the following impression:

> "Based upon [appellant's] history of exposure and chest x-ray findings, I feel that he does have asbestosis. [He] is aware of the fact that he is at increased risk for the development of cancer of the lung and cancer of the lining of the lung. [Appellant] is aware of the fact that he may develop progressive problems with shortness of breath through the years because of his asbestosis. It was recommended that he be seen on a regular basis because of the potential complications of his asbestosis as outlined above."

The employing establishment submitted appellant's pulmonary function records and radiologic screenings. On November 21, 1997 Dr. E.L. Fair, head of the employing establishment's Asbestos Medical Surveillance Program, reported that he concurred with Dr. Scutero's assessment and felt that appellant's claim was most probably valid. Dr. Fair noted, however, that no one could say with any degree of certainty of whether the exposure that resulted in appellant's disease occurred in his federal employment or his early employment at Newport News Shipbuilding or the foundry.

The Office of Workers' Compensation Programs referred appellant, together with the medical record and a statement of accepted facts, to Dr. Thomas P. Splan, a specialist in pulmonary disease, for a second opinion evaluation. On July 20, 1998 he related appellant's history and findings on physical examination. Dr. Splan diagnosed "asbestosis by history," among other conditions and reported: "It is my impression that [appellant] has the above-mentioned disabilities, which are permanent. He should be evaluated on an annual basis. [Appellant] should be considered completely disabled."

On September 22, 1998 an Office medical adviser reported that Dr. Splan's diagnosis of "asbestosis by history" was not supported by chest x-ray findings, which were consistent with congestive heart failure. The medical adviser reported that "asbestos exposure by history" would be more appropriate and might lead over the long term to asbestosis. He explained that the condition of asbestosis was progressive and the results of this condition might not become evident for several years.

The Office determined that a conflict in medical opinion existed regarding the causal relationship of appellant's asbestosis to federal employment. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Barton Gumpert, a Board-certified specialist in pulmonary disease. Dr. Gumpert advised the Office, however, that he no longer performed impartial medical evaluations.

On January 12, 1999 Dr. Virginia I. Miller, the Office's national medical director, reviewed the medical evidence on file. Dr. Miller reported that while appellant had asbestos exposure, the history of which had driven the diagnosis of asbestosis, there were no physical findings, from x-rays and so forth, to confirm such a diagnosis, "particularly in the face of other diagnoses that can easily explain the pulmonary findings." She advised that a computerized tomography (CT) scan might be helpful in establishing the presence or absence of asbestosis. Dr. Miller could not establish the presence of asbestosis or impairment due to asbestosis from the medical data at hand; a complete medical history that encompasses appellant's neurological and cardiac history, a physical examination, appropriate tests and a reasoned medical opinion were needed to do so.

In a decision dated February 4, 1999, the Office denied appellant's claim on the grounds that he failed to establish fact of injury. The Office found that the initial evidence of file supported that appellant actually experienced the claimed employment factor; however, the medical evidence did not confirm that he had asbestosis.

In a decision dated July 18, 1999, an Office hearing representative vacated the Office's February 4, 1999 decision on the grounds that an unresolved conflict in medical opinion existed between appellant's attending physician and the Office medical adviser, a conflict that could not be resolved by the Office's national medical director. The hearing representative remanded the case for a referee medical evaluation.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. E.H. Derring, Jr., a Board-certified specialist in pulmonary disease. In a report dated October 19, 1999, he related appellant's complaints, together with appellant's medical and occupational history. After describing his findings on physical examination,

Dr. Derring diagnosed, among other things, rule out asbestosis and rule out chronic obstructive pulmonary disease. He recommended that appellant undergo a CT scan of the chest, as this would be helpful in assessing interstitial or pleural abnormalities associated with occupational asbestos exposure.

After obtaining a CT scan of the thorax on October 25, 1999, Dr. Derring reported on October 28, 1999 that the test showed no significant interstitial lung disease. Calcified pleural plaque and deformity of the left posterior ribs were identified. The loculated fluid collection in the left hemithorax previously noted in April 1995 was no longer present. Dr. Derring then reported as follows:

> "[Appellant's] pulmonary conditions include probable chronic obstructive pulmonary disease (history of cigarette smoking and possible industrial bronchitis). He has permanent tracheostomy and is status post previous episodes of pneumonia, possible aspiration (1998 and 1995). It is noted that he underwent left thoracotomy for drainage of documented left pleural effusion (possible empyema). The findings on CT scan of the chest are consistent with the previous left thoracotomy and the pleural calcifications may be postinflammatory, however, asbestos-related pleural changes are not absolutely excluded.
>
> "His unrelated conditions include syringomyelia and hypertension, as well as history of atherosclerotic cardiovascular disease. He may have component of congestive heart failure (note mild perihilar interstitial haziness on CT scan of the chest).
>
> "[Appellant] does not have findings of pulmonary asbestosis in that he does not have interstitial fibrosis on CT scan of the chest (with high resolution protocols). It is noted previously that he is unable to perform pulmonary function testing.
>
> "In summary, his dyspnea is multifactorial, but he does not have findings adequate to make the diagnosis of pulmonary asbestosis."

The Office requested that Dr. Derring clarifiy what diagnosed conditions were related to appellant's federal employment. On November 17, 1999 he responded: "As noted previously, he did not have findings adequate to make the diagnosis of pulmonary asbestosis. Consequently, the diagnosed conditions as documented previously are not felt to be related to his federal employment."

In a decision dated November 18, 1999, the Office denied appellant's claim on the grounds that the evidence of file failed to demonstrate that appellant sustained an employment injury.

In a decision dated August 15, 2000, an Office hearing representative affirmed the denial of appellant's claim. The hearing representative found that Dr. Derring's opinion carried the weight of the medical opinion evidence and established that there were not adequate findings to make the diagnosis of pulmonary asbestosis.

In a decision dated November 30, 2000, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

The Board finds that this case is not in posture for decision. Clarification is needed to resolve whether appellant sustained a pulmonary condition causally related to his accepted exposure to asbestos in federal employment.

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.[2]

Causal relationship is a medical issue[3] and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,[4] must be one of reasonable medical certainty[5] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[6]

In this case, a conflict in medical opinion arose over whether appellant had asbestosis. His attending physician, Dr. Scutero, reported that appellant had asbestosis based on his history of exposure and chest x-ray findings. The Office medical adviser disagreed because chest x-ray findings did not support the diagnosis of "asbestosis by history." The national medical director contributed to the conflict when she reported that there were no physical findings, from x-rays and so forth, to confirm a diagnosis of pulmonary asbestosis.

To resolve whether appellant had asbestosis, the Office referred appellant to a referee medical specialist, Dr. Derring, who explained that appellant did not have findings of pulmonary asbestosis in that he did not have interstitial fibrosis on CT scan of the chest with high resolution protocols. He further explained that, as appellant did not have findings adequate to make the diagnosis of pulmonary asbestosis, the diagnosed conditions as documented previously were not felt to be related to appellant's federal employment.

---

[1] 5 U.S.C. §§ 8101-8193.

[2] *See generally John J. Carlone*, 41 ECAB 354 (1989); *Abe E. Scott*, 45 ECAB 164 (1993); *see also* 5 U.S.C. § 8101(5) ("injury" defined); 20 C.F.R. §§ 10.5(a)(15)-.5(a)(16) ("traumatic injury" and "occupational disease or illness" defined).

[3] *Mary J. Briggs*, 37 ECAB 578 (1986).

[4] *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[5] *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

[6] *See William E. Enright*, 31 ECAB 426, 430 (1980).

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

Appellant does not have findings of pulmonary asbestosis, Dr. Derring reported that the CT scan dated October 25, 1999 showed pleural abnormalities. He stated that the calcified pleural plaque shown on the CT scan "may be postinflammatory, however, asbestos-related pleural changes are not absolutely excluded." If these pleural changes are in fact related to appellant's accepted exposure to asbestos in federal employment, then he has sustained an injury while in the performance of his duties notwithstanding the absence of pulmonary asbestosis. Dr. Derring's opinion is, therefore, equivocal and requiries clarification.

On remand the Office shall request a supplemental opinion from Dr. Derring on whether the pleural calcifications he reported are related to appellant's accepted exposure to asbestos in federal employment. After such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's claim.

The November 30 and August 15, 2000 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
February 1, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[7] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).